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No. 00-1039

In the Supreme Court of the United States

LOUIS SPITALIERI, PETITIONER

v.

UNIVERSAL MARITIME SERVICE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 922, permits the Department of Labor to terminate temporary total disability benefits retroactively and provide the employer a credit for its past overpayments, to be applied against permanent partial disability benefits due to the same claimant based on the same claim.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Auer v. *Robbins*, 519 U.S. 452 (1997)	10
Bethlehem Shipbuilding Corp. v. *Cardillo*, 102 F.2d 299 (1st Cir.), cert. denied, 307 U.S. 645 (1939)	9
Ingalls Shipingbuilding, Inc. v. *Director, OWCP*, 519 U.S. 248 (1997)	6
Intercounty Constr. Corp. v. *Walter*, 422 U.S. 1 (1975)	9
Jarka Corp. v. *Hughes*, 299 F.2d 534 (2d Cir. 1962)	12
McCord v. *Cephas*, 532 F.2d 1377 (D.C. Cir. 1976)	5, 13
Metropolitan Stevedore Co. v. *Rambo*, 521 U.S. 121 (1997)	10, 12
Miller v. *Sundial Marine Tug & Barge*, 23 Ben. Rev. Bd. Serv. (MB) 601 (1990) (ALJ)	11
Pinizzotto v. *Marra Bros., Inc.*, 1 Ben. Rev. Bd. Serv. (MB) 241 (1974)	11
Potomac Elec. Power Co. v. *Director, OWCP*, 449 U.S. 268 (1980)	2, 4, 11
Shahid v. *District Utils. Co.*, 17 Ben. Rev. Bd. Serv. (MB) 333 (1985) (ALJ)	11
Wisniewski v. *United States*, 353 U.S. 901 (1957)	12

Statutes and regulations: Page

Longshore and Harbor Workers' Compensation Act,
33 U.S.C. 901 *et seq.* 2
33 U.S.C. 902(6) 2
33 U.S.C. 908 2
33 U.S.C. 908(c) 2
33 U.S.C. 919(d) 2
33 U.S.C. 922 ..... *passim*
33 U.S.C. 939 2
20 C.F.R.:
Section 701.301(a)(7) 2
Section 702.373 3

Miscellaneous:

H.R. Rep. No. 1244, 73d Cong., 2d Sess. (1934) 9
S. Rep. No. 588, 73d Cong., 2d Sess. (1934) 9

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 226 F.3d 167. The en banc decision and order of the Department of Labor's Benefits Review Board (Pet. App. 16-41) are reported at 33 Ben. Rev. Bd. Serv. (MB) 164.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 2000. The petition for a writ of certiorari was filed on December 20, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, requires maritime employers to pay compensation when a work-related injury causes disability or death to a covered employee. Compensation is payable for temporary disability, which may be partial or total, and for permanent disability, which also may be partial or total. 33 U.S.C. 908; see also *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 273-274 (1980) (discussing statutory scheme). Compensation for permanent partial disability is paid "in addition to compensation for temporary total disability or temporary partial disability." 33 U.S.C. 908(c). The Secretary of Labor administers the LHWCA's compensation program. See 33 U.S.C. 902(6), 939.

Section 22 of the LHWCA, 33 U.S.C. 922, authorizes modification of compensation awards "on the ground of a change in conditions or because of a mistake in a determination of fact." In a modification proceeding, an administrative law judge (ALJ)[1] shall

> issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the

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[1] Section 922 allows a "deputy commissioner" to reopen an earlier award. 33 U.S.C. 922. Section 919(d) of Title 33, however, vests the "powers, duties, and responsibilities" of deputy commissioners with respect to LHWCA hearings in ALJs. Regulations promulgated by the Department of Labor use the term "district director" in lieu of the statutory term "deputy commissioner" to identify the officials who have responsibility for compensation claims. See 20 C.F.R. 701.301(a)(7).

> compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the [adjudicating officer] with the approval of the Secretary.

33 U.S.C. 922; see also 20 C.F.R. 702.373 (implementing regulation, closely tracking statutory language).

2. In April 1992, petitioner was injured while working as a longshoreman for respondent Universal Maritime Service Corporation (Universal). Pet. App. 3, 17. In November 1993, an ALJ awarded petitioner temporary total disability benefits under the LHWCA, based on findings that petitioner had sustained work-related injuries to his head, neck, back, and left leg in addition to a hearing loss and psychiatric problems. *Id.* at 3. The ALJ declined to award benefits for permanent disability. *Id.* at 3, 57.

3. Universal paid petitioner the required temporary total disability benefits on a weekly basis, in the amount of two-thirds of petitioner's average weekly wage at the time of the injury. Pet. App. 3. In 1996, however, Universal requested modification of the disability award under Section 922 on the ground that petitioner's condition had changed and he was no longer disabled. *Id.* at 3-4, 17. Universal submitted surveillance videotapes showing petitioner going into stores, working on his car, carrying automotive parts, and climbing stairs. Universal also submitted, among other evidence, the affidavit of a witness stating that

petitioner was able to perform all types of physical activities and worked at auto body shops, off the books, at least five days per week. *Id.* at 80-81.

An ALJ granted Universal's request for modification. Pet. App. 55-90. The ALJ found that petitioner was no longer entitled to compensation for temporary disability because his medical condition was not improving and therefore any continuing disability was no longer temporary. *Id.* at 82. He further concluded that petitioner was entitled to have Universal pay for a hearing aid to address ongoing hearing loss, but that petitioner was not entitled to compensation for a permanent disability because his injuries did not prevent him from doing his usual work. *Id.* at 87-88. The ALJ accordingly terminated petitioner's temporary disability benefits and granted Universal a credit for all payments it made after August 31, 1994—the date on which, the ALJ determined, petitioner had reached his maximum medical improvement and ceased to be temporarily disabled. *Id.* at 88-89. Although the ALJ based his decision on a change in conditions after the original compensation award in 1993, the evidence presented during the modification proceeding would have supported the same result based on the alternative ground that the original award rested on a mistake of fact. *Id.* at 88 n.3.

On reconsideration, the ALJ determined that petitioner was entitled to compensation, totaling $7465, for a permanent partial disability based on his hearing loss, regardless of his ability to work. Pet. App. 51-52; see generally *Potomac Elec. Power*, 449 U.S. at 269. The ALJ, however, reaffirmed his holding that Universal was entitled under Section 922 to a credit against future benefits, to offset Universal's overpayments of temporary disability benefits after the time when

petitioner's temporary total disability ceased. Pet. App. 50-51.

4. The Benefits Review Board (Board) affirmed in part and reversed in part. Pet. App. 42-49. The Board affirmed the ALJ's finding that petitioner no longer had a temporary total disability, but determined that the ALJ should have used February 21, 1996, instead of August 31, 1994, as the date when petitioner's temporary disability ended. *Id.* at 46-48.

The Board also determined that Universal was not entitled to credit its overpayments for temporary total disability against the permanent partial disability award for hearing loss. Pet. App. 47-48. The Board concluded that although Section 922 allows a credit when a modification order "decreas[es] the compensation rate," that language does not apply when the modification award terminates compensation altogether. *Id.* at 48. Because the ALJ in this case terminated temporary disability benefits rather than reducing them, the Board reasoned, Section 922 did not authorize the ALJ to award Universal a credit against its new liability for petitioner's hearing loss. *Ibid.*

The Board granted reconsideration en banc, but adhered to its conclusion that Universal was not eligible for a credit. Pet. App. 16-27. The en banc Board relied on the fact that Congress authorized modifications that "terminate" compensation, in addition to modifications that "decrease" compensation. That distinction, in the Board's view, precluded the ALJ's reading of Section 922, under which a termination of benefits would be deemed a decrease in benefits for purposes of awarding the employer a credit for any overpayments. *Id.* at 20-21. The Board also rejected the argument that *McCord* v. *Cephas*, 532 F.2d 1377 (D.C. Cir. 1976), foreclosed its reading of Section 922 and concluded that, to the con-

trary, judicial and Board precedent supported its interpretation. Pet. App. 21-23 & n.1.

Board Members McGranery and Brown dissented. Pet. App. 28-41. In their view, *McCord* directly supported the ALJ's award of a credit for Universal's overpayments of temporary disability benefits. *Id.* at 28-32. The dissenting judges also pointed out that the Board's reading of Section 922 "would provide a credit to an employer whose liability was decreased to $1 but not to an employer whose liability is decreased to zero." *Id.* at 33. Deeming that result "unreasonable and unjust," the dissenting judges concluded that it was contrary to Congress's objectives when drafting Section 922. *Id.* at 32-34.

5. Universal petitioned for review of the Board's decision. The Director of the Office of Workers' Compensation Programs (OWCP), who had not previously participated in the case, supported Universal's petition. See *Ingalls Shipbuilding, Inc.* v. *Director, OWCP*, 519 U.S. 248, 262-270 (1997) (Director of OWCP is a proper agency respondent in court of appeals proceedings to review Board decisions). The court of appeals granted the petition and reversed. Pet. App. 1-15.

The court of appeals found the Director's interpretation of Section 922—that credits are appropriate when an award is terminated retroactively—to be "reasonable and consistent with Congressional intent," and therefore entitled to deference. Pet. App. 7. Recognizing that the LHWCA allows an ALJ both to "terminate" compensation and to "decrease" compensation, 33 U.S.C. 922, the court nevertheless concluded that the authorization of a credit to the employer when a modification order "decreas[es] the compensation rate" is most naturally read as encompassing terminations of compensation as well as lesser reductions in

compensation. Pet. App. 7-9. The Board's contrary construction—under which an employer could be *worse* off if the ALJ terminates its liability under an existing award rather than just reducing the amount of the award—was "narrowly technical and impractical." *Id.* at 8 (internal quotation marks and citation omitted). To distinguish between terminations of compensation and other reductions of compensation for purposes of awarding credits, the court concluded, "would counter normal English usage and have no relation to the statutory purpose, which is to compensate employees an amount fixed under the statute for their injuries, and to cease payment when circumstances so require." *Id.* at 10.[2]

Finally, the court rejected petitioner's argument that a retroactive modification decreasing the compensation rate and awarding a credit to the employer is permissible only when the ALJ relies upon a mistake of fact, not a change of conditions. Pet. App. 11-14. The court noted that such a reading would limit the ALJ's ability to modify compensation awards in the interests of justice, and thus be contrary to the fundamental objective underlying Section 922. *Id.* at 12-13. In the court's view, petitioner's suggested limitation also was contrary to the legislative history of Section 922, and, according to the Director, to "longstanding actual

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[2] The court of appeals also held that the Board acted within its discretion when it made its modification retroactive to February 21, 1996, the first date on which the change of conditions (cessation of petitioner's temporary disability) existed. The court of appeals held that when Congress provided that a modification "*may* be made effective from the date of the injury," 33 U.S.C. 922 (emphasis added), it gave ALJs "the broad authority to make a modification effective from the date when an injury occurred and any date after the injury when a change in conditions occurs." Pet. App. 10.

implementation of the provision." See *id.* at 13-14 (quoting Director's brief).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review by this Court therefore is not warranted.

1. Petitioner argues that the "clear and unambiguous language" (Pet. 11) of Section 922 establishes that "decreasing the compensation rate" does not include terminating an award. See Pet. 10. Accordingly, petitioner maintains that Congress's authorization of retroactive decreases, with credits to the employer, does not apply to terminations. As the court of appeals explained (Pet. App. 9), however, a termination of benefits has the effect of "decreasing the compensation rate" (33 U.S.C. 922) to zero. Thus, retroactive terminations of compensation fit comfortably within the authorization of retroactive decreases.

There is no inconsistency between the court of appeals' interpretation and Section 922's authorization of modifications that "terminate, continue, reinstate, increase, or decrease" compensation. See Pet. 10. Congress's separate listing of terminations and decreases in that sentence does not alter the fact that terminations "decreas[e] the compensation rate" within the meaning of the succeeding sentence of Section 922. Moreover, as the court of appeals emphasized (see Pet. App. 9-10, 13), it would be nonsensical for Congress to authorize retroactive modification and a credit when an ALJ reduces compensation to a nominal amount, while forbidding

similar relief when an ALJ determines that compensation should not have been paid at all.[3]

2. Petitioner asserts (Pet. 8-9, 11) that a modification order may be applied retroactively only when it is predicated on a mistake of fact at the time of the original award. The plain language of the LHWCA, however, allows modification "on the ground of a change in conditions or because of a mistake in a determination of fact," and permits retroactive application of "award[s] decreasing the compensation rate" without any limitation based on the rationale for the decrease. 33 U.S.C. 922. Indeed, legislators who drafted the relevant language in Section 922 specifically contemplated that retroactive awards would apply "when *changed conditions* or a mistake in a determination of fact makes such modification desirable." Pet. App. 13 (quoting S. Rep. No. 588, 73d Cong., 2d Sess. 4 (1934), and H.R. Rep. No. 1244, 73d Cong., 2d Sess. 4 (1934)) (emphasis added); see generally *Intercounty Constr. Corp.* v. *Walter*, 422 U.S. 1, 8-12 (1975) (discussing 1934 amendment to Section 922).

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[3] Petitioner further argues that retroactive reduction of an award, with a credit to the employer, is allowed only when there is unpaid compensation "out of which the reduction [*i.e.*, the employer's credit] may be recouped." Pet. 10; see *Bethlehem Shipbuilding Corp.* v. *Cardillo*, 102 F.2d 299, 302 (1st Cir.) (under 33 U.S.C. 922, "the insurer in no case receives back any compensation previously paid but may have prior excess payments credited or allowed upon a present award, future awards, or any prior unpaid award"), cert. denied, 307 U.S. 645 (1939). That argument does not help petitioner, however, because unpaid compensation exists in this case. At the same time the ALJ retroactively terminated petitioner's temporary total disability benefit, he awarded a partial permanent disability benefit for loss of hearing. Pet. App. 51-52. The ALJ properly could, and did, apply the employer's credit against those future payments.

Even if the court of appeals had accepted petitioner's proposed restriction on retroactive modifications, despite the plain language and legislative history of Section 922, the outcome of this case likely would not have been affected. The ALJ concluded that the evidence supported a finding that the 1993 disability award was based on a mistake of fact, not just that conditions changed thereafter. Pet. App. 88 n.3. In other words, in the ALJ's view, the evidence was sufficient to establish that petitioner was *never* totally disabled and (as the court of appeals put it) "was feigning temporary total disability" from the start. *Id.* at 7. Petitioner does not challenge the ALJ's factual determination. But accepting it renders petitioner's argument that a retroactive modification must be premised on a mistake of fact irrelevant for purposes of this case.

3. The court of appeals "agree[d] with" the Director's interpretation of Section 922 and found petitioner's interpretation "unreasonable." Pet. App. 9. Yet if there had been ambiguity, the court of appeals alternatively was prepared to defer to the Director's reasonable interpretation of the LHWCA. *Id.* at 7-8.

Petitioner objects to that alternative basis for the court of appeals' decision, arguing (Pet. 17-22) that the Director's position did not warrant deference because it was put forward in the course of litigation and had not been stated in a regulation. This Court, however, has recognized that the Director's reasonable interpretations of the LHWCA carry "persuasive force" when expressed during briefing because of the Director's role in administering and enforcing the statute. *Metropolitan Stevedore Co.* v. *Rambo*, 521 U.S. 121, 136 (1997) (citing Director's brief); cf. *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997) (agency's construction of its own regu-

lations that is articulated during appellate litigation warrants deference where the construction appears to "reflect the agency's fair and considered judgment on the matter in question"). The Board, by contrast, is not a policymaking body and its views (with which the Director disagreed in this case) are not entitled to any particular deference. *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980). Furthermore, as the Director correctly represented to the court of appeals (see Pet. App. 14), the Director's position in this case is consistent with the Department of Labor's implementation of Section 922 over many years. See, *e.g.*, *Miller* v. *Sundial Marine Tug & Barge*, 23 Ben. Rev. Bd. Serv. (MB) 601, 609-610, 611 (1990) (ALJ); *Shahid* v. *District Utils. Co.*, 17 Ben. Rev. Bd. Serv. (MB) 333, 335-337 (1985) (ALJ); *Pinizzotto* v. *Marra Bros., Inc.*, 1 Ben. Rev. Bd. Serv. (MB) 241, 243-244 (1974).

4. Petitioner acknowledges that the decision of the court of appeals does not actually conflict with any decision of this Court or another court of appeals. See Pet. 23 ("This Court has not (nor [has] any court until now) interpreted the very specific language of [Section 922] relative to disposition of awards when modification is granted."). Nevertheless, petitioner asserts (Pet. 13-16) that the decision below is inconsistent with snippets of language or implications drawn from various decisions. Even that limited assertion is incorrect.

Most obviously, petitioner errs in suggesting (Pet. 16) that this Court's failure to consider the issue of retroactive modification when deciding *Rambo* is attributable to the fact that modification of the compensation order in that case was based on a change in conditions rather than a mistake of fact. The question presented in *Rambo* was "whether the Act bars

nominal compensation to a worker who is presently able to earn at least as much as before he was injured." 521 U.S. at 123. Retroactivity was not at issue, and the Court's failure to discuss it has no significance.

Petitioner also places great weight (Pet. 13-14) on *Jarka Corp.* v. *Hughes*, 299 F.2d 534 (2d Cir. 1962). In *Jarka*, the Second Circuit reversed a retroactive increase in the employee's disability compensation after finding that the stated reason for modifying the original compensation award (that conditions changed after the original award) conflicted with the modification itself (which reclassified the employee's disability as of a date before the original award). *Id.* at 536. The court of appeals noted in dictum that modifying a compensation award retroactively to the date of injury would "only make[] sense" when the modification is based on a mistake of fact. *Id.* at 536-537. As the court of appeals explained in this case (Pet. App. 12), that dictum is not inconsistent with the holding here: the modification in this case was made retroactive to a date *after* the original compensation order, not to the date of injury. Unlike a modification that is retroactive all the way back to a date before the original decision, a modification that is retroactive to a date after the original decision can logically be supported by a change in conditions. There accordingly is no inconsistency between *Jarka* and the decision below. Even if there were an inconsistency, moreover, such an intra-circuit conflict would not be a reason to grant the petition for a writ of certiorari. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the

task of a Court of Appeals to reconcile its internal difficulties.").[4]

Finally, petitioner's effort (Pet. 15-16) to distinguish *McCord* v. *Cephas*, 532 F.2d 1377 (D.C. Cir. 1976), is unavailing. In *McCord*, the District of Columbia Circuit rejected the argument, repeated by petitioner here, that Section 922 does not authorize retroactive rescission of compensation awards. *Id.* at 1379-1380. Petitioner is correct that *McCord* involved a modification based on a mistake of fact rather than changed conditions. See Pet. 15-16. But, as discussed above, the ALJ in this case found that the retroactive modification with a credit could have been based on a mistake of fact. See p. 10, *supra*. Accordingly, the court of appeals was correct (Pet. App. 12-13) that *McCord* supports its decision.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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[4] Petitioner's remaining claims of inconsistency with other appellate decisions (Pet. 14-15) are insubstantial. Petitioner's own characterization of those cases shows that there is no conflict with the holding of the court of appeals in this case.